and hockey before issuing its Final Report.

4. With respect to college basketball, the Commission notes that all games of the NCAA men's Final Four Tournament, college basketball's premier event, are shown on broadcast television and therefore cannot be said to have migrated to cable. With respect to college football, commenters do not contend that games previously broadcast have migrated to cable television. Rather, they contend that preclusive contracts between telecasters and the various college football conferences limit the number of college football games available for broadcast by local over-the-air stations. Section 26 of the 1992 Cable Act specifically directs the Commission to investigate the existence and prevalence of such preclusive contracts. The Commission states that the record of this proceeding indicates that arrangements between the college football conferences and ABC, ESPN and regional cable sports networks may have a preclusive effect on the televising of games by local broadcast stations. The Interim Report therefore states the Commission's intention to request further information regarding such preclusive contracts at a later date.

5. The Interim Report also summarizes commenters' views regarding the future of sports programming. In general, cable and sports entities contend that broadcast television will continue to play a primary role in the distribution of sports programming. They also submit that new technologies will increase consumer choice, that retransmission consent revenues may enable broadcasters to better negotiate for cable entities for the purchase of sports programming, and that the current sports antitrust exemptions should not be revised.

6. Finally, the Commission states that it will issue a Further Notice of Proposed Rule Making in anticipation of its July 1, 1994, Final Report. In that Further Notice, the Commission expects to seek additional information on league changes and new broadcasting arrangements for the NBA, MLB and the NHL. The Commission will also request further data regarding preclusive contracts, local college football and basketball telecasts, and the cost of subscribing to the various cable sports services.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary

[FR Doc. 93–16835 Filed 7–14–93; 8:45 am]

BILLING CODE 6712–01–M

Proposed Rules

Federal Register
Vol. 58, No. 134
Thursday, July 15, 1993

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 90-001A]

RIN 0583-AB29

Determining the Amenability of Birds to Mandatory Federal Inspection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food Safety and Inspection Service (FSIS) is requesting comments, information and recommendations on what criteria FSIS should use to determine if birds other than those listed in the poultry products inspection regulations issued under the Poultry Products Inspection Act should be subject to mandatory Federal inspection. This action responds to increased interest in raising birds other than chickens, turkeys, ducks, geese and guineas, and a need for FSIS to determine their amenability to Federal inspection requirements under the Poultry Products Inspection Act.

DATES: Comments must be received on or before: October 13, 1993.

ADDRESSES: Written comments to: Policy Office, Attn: Linda Carey, FSIS Hearing Clerk, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments should be directed to: Ralph E. Stafko at (202) 720-8168. (See also "Comments" under **SUPPLEMENTARY INFORMATION.**)

FOR FURTHER INFORMATION CONTACT: Ralph E. Stafko, Director, Policy Office, Policy Evaluation and Planning Staff, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 720-8168.

SUPPLEMENTARY INFORMATION:

Comments

Interested persons are invited to submit comments concerning this Notice. Written comments should be sent to the Policy Office at the address shown above. Please include docket number 90-001A in your comments. Any person desiring an opportunity for oral presentation of views as provided under the Poultry Products Inspection Act should make a request to Mr. Stafko at (202) 720-8168 so that arrangements can be made for such views to be presented. All comments submitted in response to this Notice will be available for public inspection in the Policy Office between 9 a.m. and 12:30 p.m. and 1:30 p.m. and 4 p.m., Monday through Friday.

Background

The Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), defines poultry subject to inspection as "any domesticated bird whether live or dead" (21 U.S.C. 453(e)). The PPIA does not contain a definition of "domesticated bird." The poultry products inspection regulations define poultry to be "any domesticated bird (chickens, turkeys, ducks, geese, or guineas), whether live or dead" (9 CFR 381.1(b)(40)). While a review of the legislative history of the PPIA does not provide a definition as to what Congress intended "domesticated" to mean, it does clearly indicate that commercially produced gamebirds were not to be covered and subject to mandatory inspection. The legislative history indicates that gamebird breeders were usually small operators, who slaughtered by hand or might require special adjustments in equipment for such slaughter, and that the market was a seasonal one and came at peak processing time. The legislative history indicates that for these and other reasons, Congress chose to exclude them from coverage under the Act.

By comparison, the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), delineates the specified species, i.e., cattle, sheep, swine, goats, horses, mules, and other equines for which inspection is required. These same species are listed in the definition of livestock in 9 CFR 301.2(qq). Under the FMIA, there is no mandate to distinguish between domesticated or wild variants of the listed amenable species.

Products determined to be nonamendable to either the FMIA or PPIA are subject to the Federal Food, Drug and Cosmetic Act (FFDCA) and fall under the jurisdiction of the Food and Drug Administration (FDA). Thus, products of animals (e.g., deer or bear) or birds not currently listed in the regulations (e.g., ostriches, pheasants) are covered by the FFDCA. However, USDA provides voluntary inspection of water buffalo, deer, rabbits, squabs, gamebirds and other nonamenable species, on a fee for service basis, under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*).

Previous Species Amenability Determinations

Determinations of amenability of species under the FMIA have raised few problems. The express listing of amenable species has enabled the Agency to make decisions on amenability based on physical observation and biological data. For example, beefalo, which are ⅛ buffalo, ⅞ bovine, and are virtually identical in physical appearance to other bovine, have been found to be amenable to Federal inspection. Cattalo, which are ½ buffalo and ½ bovine, were deemed not amenable because of the cattalo's buffalo-like appearance and behavior.

In 1984, FSIS received inquiries from a foreign government and domestic wild game producers regarding the amenability of wild sheep and wild boar to inspection. After review, both species were determined to be amenable because swine and sheep are expressly listed by the FMIA as requiring inspection. FSIS had adhered to a literal reading of the FMIA in making these determinations. For all determinations under the FMIA, the sole issue is whether the animal is a member of the species listed, regardless of whether it is raised in the wild or on the farm—wild sheep and wild boar raised or not raised in captivity are considered amenable; deer and antelope raised or not raised in the wild are considered nonamenable.

Unfortunately, amenability decisions under the PPIA have been more difficult to reach than those under the FMIA because the amenable species of birds are not specifically listed in the PPIA. Rather, as noted earlier, Congress, when passing the PPIA, indicated only that "poultry" means any domesticated bird, whether live or dead.

Congress did not list the kinds of birds that were considered to be "domesticated," but USDA has defined "poultry," in the poultry products inspection regulations, as being certain

listed birds. This was done in an attempt to reflect the intent of Congress not to cover commercially produced gamebirds. Consequently, unlisted kinds of birds, even if commercially produced, would not be amenable to inspection and listed kinds of birds, even if raised unconventionally, would be considered amenable.

Regarding gamebirds, the legislative history of the PPIA indicates that commercially-produced gamebirds were not covered by the PPIA and subject to mandatory Federal inspection. However, Congress did not define "gamebirds." The Agency has interpreted Congress' use of the word "domesticated" in the PPIA to include only those birds which are traditionally raised in captivity for human consumption, i.e., chickens, turkeys, ducks, geese and guineas. Commercially produced gamebirds, such as pheasant, quail and partridge, have not been considered as subject to inspection, in accordance with the legislative history of the PPIA.

Amenability of Wild Turkeys and Other Poultry

A few years ago, FSIS became aware of an operation which produces "wild turkeys" for slaughter, processing and sale in interstate commerce. FSIS was requested by Toubl Gamebird Farms, Beloit, Wisconsin, (the operation in question), to declare "wild turkeys" nonamenable to mandatory inspection under the PPIA on the grounds that a wild turkey is a gamebird even when raised in captivity, and thus is not a domesticated bird. It was stated that the PPIA only covers "domesticated" birds and, therefore, does not apply to "wild turkeys." Toubl Gamebird Farms submitted information from an individual, who indicated he was an avian specialist, who attested that wild turkeys are genetically different from domesticated turkeys. Similar correspondence from other gamebird farmers and the North American Gamebird Association, Inc., reflects agreement with Toubl Gamebird Farms concerning the nonamenability of wild turkeys which are raised in captivity.[1] After considering this matter, however, FSIS determined that the processed turkeys had to be federally inspected under the PPIA. This determination was based on the view that the turkeys were not commercially produced gamebirds, but were turkeys raised in captivity, and, therefore, they were considered to be "domesticated turkeys" required to be inspected under the PPIA.

In addition to the question of the amenability of wild turkeys, FSIS is currently faced with questions about the amenability of other kinds of birds. FSIS has received inquiries about inspection from producers of ostriches, emus, rheas and mallard ducks. FSIS has made an initial determination that ostriches, emus and rheas are not amenable because, although raised in captivity, they are not poultry, i.e., chickens, turkeys, ducks, geese or guineas, as defined in the regulations. Conversely, in the case of mallard ducks, the Agency has determined that mallard ducks are amenable because they are ducks raised in captivity. A breed of fowl that is becoming increasingly popular in the Western United States is an Asiatic-derived bantam chicken known as "silkie fowl." Silkie fowl resemble the cornish hen breed in weight and size, but their skin, bone, viscera and blood vessels have a bluish-black pigmentation. FSIS has determined that silkie fowl are chickens and, thus, must be inspected.

A variety of birds other than the species listed in the regulations is being produced for food purposes, and the volume of production of those species is expected to increase. FSIS needs to make a determination whether or not those birds are "domesticated birds," and whether or not they are covered by the PPIA. In reviewing this matter, FSIS intends to consider: public health, precedent, legislative history, potential impacts on producers and processors, limited inspection resources, and the adequacy of alternative regulatory approaches that are consistent with the PPIA and the FFDCA.

Need for Objective Criteria

Consistent and predictable amenability determinations of birds have been difficult in the absence of a definition of "domesticated bird" in the PPIA and regulations issued thereunder. The need for such a definition, and for a reassessment of the criteria used for making amenability determinations, is becoming increasingly apparent in light of continuing advancements in genetic engineering, increasing public interest in consumption of birds other than those traditional poultry species, and increasing Agency workloads caused by growing consumption of poultry. Standardized definitions and criteria will promote fairer, more efficient and effective decisionmaking and will provide more consistent precedents and clearer guidance for both program personnel and affected parts of the food industry.

Request for Comments

FSIS is soliciting comments, information and recommendations in the following areas:

- Definitions of "domesticated" and "commercially produced game birds;"
- The criterion(a) FSIS should use in making amenability determinations regarding whether a bird is amendable to the requirements of the PPIA. Currently, under the PPIA, FSIS inspects only certain birds which are raised in captivity for human consumption, i.e., chickens, turkeys, ducks, geese and guineas;
- The kinds and numbers of birds, other than the species currently listed in the PPIA regulations, now being produced for human consumption;
- The kinds of birds, other than the species currently listed in the PPIA regulations, that may be produced for human consumption in the future;
- Any other comments or recommendations on the subject of determining amenability of birds to the PPIA.

The preamble to any proposed regulation would include a discussion of the comments received in response to this notice.

Done at Washington, DC, on July 9, 1993.

Eugene Branstool,

Assistant Secretary, Marketing and Inspection Service.

[FR Doc. 93–16784 Filed 7–14–93; 8:45 am]

BILLING CODE 3410–DM–M

[1] All documents referred to in this paragraph are available from the United States Department of Agriculture, Food Safety and Inspection Service, room 3171 South, 14th and Independence Avenue SW., Washington, DC 20250.

FARM CREDIT ADMINISTRATION

12 CFR Part 614

RIN 3052–AB46

Loan Policies and Operations

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA), by the Farm Credit Administration Board (Board) proposes to amend the regulation regarding the content of borrower rights notices for distressed loans. The FCA has learned that the foreclosure language requirement may unnecessarily offend borrowers. Therefore, the proposed regulation will no longer require that Farm Credit System institutions include a reference to foreclosure when notifying borrowers that their distressed loans may be suitable for restructuring.

DATES: Comments must be submitted on or before August 16, 1993.

ADDRESSES: Comments should be mailed or delivered (in triplicate) to

Patricia W. DiMuzio, Division Director, Regulation Development Division, Office of Examination, Farm Credit Administration, McLean, Virginia 22102–5090. Copies of all comments will be available for examination by interested parties in the Regulation Development Division, Farm Credit Administration.

FOR FURTHER INFORMATION CONTACT: Eric Howard, Policy Analyst, Office of Examination, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, or James M. Morris, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TDD (703) 883–4444.

SUPPLEMENTARY INFORMATION: The Agricultural Credit Act of 1987 (Pub. L. 100–233) enacted on January 6, 1988, amended the Farm Credit Act of 1971 (Act) to establish additional borrower rights. Final regulations on borrower rights (12 CFR parts 614, 615, and 618) were published on September 14, 1988, (54 FR 35427) and became effective on October 14, 1988. Section 614.4516 requires that the lender notify a borrower that its loan is or has become a "distressed loan" as defined in the Act, and may be suitable for restructuring. On the determination that a loan is or has become distressed, the present regulation also requires that the lender notify the borrower that the alternative to restructuring may be foreclosure.

The FCA has learned that the foreclosure language requirement may unnecessarily offend borrowers. The foreclosure language was included in § 614.4516 to ensure that borrowers whose loans are distressed will be informed that their loans could be subject to foreclosure unless they take positive action, such as filing an application for restructuring. The FCA now believes that the reference to "foreclosure" should be optional. Borrowers with distressed loans will still receive adequate warning of the possibility of foreclosure, since § 614.4519(a) requires that a qualified lender notify the borrower, not later than 45 days before commencing foreclosure proceedings, that the alternative to restructuring may be foreclosure. The FCA proposes to amend § 614.4516 to allow qualified lenders latitude in the timing of the foreclosure notification.

Comments are sought on § 614.4516.

List of Subjects in 12 CFR Part 614

Agriculture, Banks, Banking, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, part 614 of chapter VI, title 12 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 614—LOAN POLICIES AND OPERATIONS

1. The authority citation for part 614 continues to read as follows:

Authority: Secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.19, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.7, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act; 12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2096, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2199, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2207, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a-2, 2279b, 2279b-1, 2279b-2, 2279f, 2279f-1, 2279aa, 2279aa-5; sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart N—Loan Servicing Requirements; State Agricultural Loan Mediation Programs; Right of First Refusal

2. Section 614.4516 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 614.4516 Restructuring procedures.

(a) *Notice.* When a qualified lender determines that a loan is or has become a distressed loan, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring. The qualified lender shall include with such notice:

* * * * *

Dated: July 10, 1993.

Curtis M. Anderson,

Secretary, Farm Credit Administration Board.

[FR Doc. 93–16831 Filed 7–14–93; 8:45 am]

BILLING CODE 6705–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–32609; File No. S7–21–93]

RIN 3235–AF91

Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Proposed amendments.

SUMMARY: The Commission is proposing for comment, amendments to its broker-dealer record preservation rule that would allow broker-dealers to employ, under certain conditions, optical storage technology to maintain records required to be retained. The Commission also is proposing that this rule be amended to codify a staff interpretation that allows broker-dealers to use microfiche for record-retention purposes.

DATES: The requested written data, views, arguments and/or comments must be received on or before September 13, 1993.

ADDRESSES: People wishing to submit written data, views, arguments and/or comments should file three copies with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 6–9, Washington, DC 20549. All written data, views, arguments and/or comments should refer to File No. S7–21–93. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, or Julius R. Leiman-Carbia, Special Counsel, Office of Capital Markets and Financial Responsibility, Division of Market Regulation, Securities and Exchange Commission at (202) 272–2904 or –2824.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Background

Section 17(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") requires registered broker-dealers to make, keep, furnish and disseminate reports prescribed by the Commission "as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act.[1]

Rules 17a–3 and 17a–4 under the Exchange Act[2] specify minimum requirements with respect to the business records which must be made by broker-dealers as well as the periods during which such records and other documents relating to the broker-dealer's business must be preserved. For the most part, records preserved pursuant to these rules must be kept in an easily accessible place for two years.[3] Some records, however, must be preserved for three years[4], others for six

[1] 15 U.S.C. 78q(a)(1).

[2] 17 CFR 240.17a–3 and 240.17a–4.

[3] 17 CFR 240.17a–4(a)(1).

[4] 17 CFR 240.17a–4(b).

years[5] and those that concern the legal existence of the broker-dealer (*e.g.*, partnership articles, minute books, stock certificate books) must be preserved during the life of the broker-dealer and its successors.[6]

Until 1970, paper was the sole medium for the preservation of the records required under Rules 17a–3 and 17a–4. In 1970, Rule 17a–4 was amended to permit records to be immediately produced on microfilm as an original form of record-keeping.[7] This amendment allowed for the use of microfilm provided that the following conditions set forth in paragraph (f) of Rule 17a–4 are met:

1. At all times the broker-dealer has available, for Commission examination of his records, pursuant to Section 17(a) of the Exchange Act, facilities for immediate, easily readable projection of the microfilm and for producing easily readable facsimile enlargements;
2. The broker-dealer arranges the records and their index, and files the films in such a manner as to permit the immediate location of any particular record;
3. The broker-dealer is ready at all times to provide, and immediately provides, any facsimile enlargement which the Commission by its examiners or other representatives may request, and
4. The broker-dealer stores separately from the original one other copy of the microfilm for the time required.[8]

In 1979, the Commission's staff interpreted Rule 17a-4 to include microfiche as well as microfilm for record-keeping purposes, provided that the requirements of Rule 17a–4(f) were satisfied.[9]

B. Technical Aspects

1. Microfiche

Microfiche and microfilm are similar record-keeping media that photographically reduce the size of document images. Like microfilm, microfiche can store computer generated documents. Microfiche stored images, however, appear on a sheet of film, rather than on spooled film as with microfilm.

2. Optical Storage Technology

Optical storage technology allows for digital data recording in a non-rewriteable, non-erasable format, such as write once, read many ("WORM"), which provides a non-alterable, permanent record storage medium. Non-rewriteable optical storage records digital information by employing a laser heat source to burn a pattern on a metallic film on a disk surface that can hold billions of bytes of data ("optical disk"). This disk is removable from the hardware necessary for the optical storage function.

When using optical disk storage in the non-rewriteable format, any record, be it computer generated (such as a computer report) or electronically digitized (such as from paper or micrographics), can be permanently recorded for long term computer based management and access.

II. Proposed Amendments and Discussion

While industry representatives have argued that the use of optical disk technology will represent cost savings for broker-dealers,[10] they concede that the use of any technology employing media other than paper for the preservation of records must be conditioned with safeguards against erasability, and with provisions for the immediate verification of the stored information and for back-up facilities.

These conditions are especially necessary when, as is the case with optical disks, the technology is relatively new and there appears to be no current set industry standard for the development of optical disk technology and for compatibility among the different optical disk systems. In the case of optical disks, additional conditions appear to be necessary to ensure that the documents etched into the disk are indexed and may be downloaded by examiners from either the Commission or the self-regulatory organizations ("SROs") or by third persons available to the examiners.

The proposed amendments require that broker-dealers using optical disk storage systems employ non-rewriteable, non-erasable technology. The use of this technology ensures that the information stored in optical disks can not be modified or removed from the optical disk without detection. As an additional protection, the proposed amendments would require that broker-dealers create duplicate copies of optical disks containing records, serialize original and duplicate optical disks, and time-date the information placed on optical disks.

To ensure full access to records during regular examinations, broker-dealers utilizing optical disk technology will be required to index optical disks and place the index on the optical disks. To facilitate review of the information preserved, broker-dealers also will be required to have downloading capacity so that records kept on optical disks may be promptly downloaded onto an alternate medium such as paper, microfilm or microfiche.

The proposed conditions also are designed to provide access to information preserved in optical disks when the broker-dealer is no longer operational, when the broker-dealer refuses to cooperate with the investigative efforts of the Commission or the SROs, or when the optical disk has not been properly indexed as to its entire contents. Accordingly, broker-dealers would be required to preserve, keep current and surrender upon request the information necessary to download records stored in optical disks.[11] In addition, at least one third party, who has the ability to download information from the broker-dealer's optical disk to another medium, must file representations with the Commission to ensure and facilitate the downloading into an alternate medium of the information kept in the broker-dealer's optical storage system.

Currently, the Commission requires the submission of similar third party representations when the records preserved pursuant to Rules 17a–3 and 17a–4 are prepared or maintained on behalf of the broker-dealer by an outside service bureau, depository, bank or other record-keeping service.[12] Like the representations currently required by the Commission, the proposed representations regarding optical disk storage are intended to ensure cooperation by third parties.

III. Request for Comments

The Commission invites interested persons to submit written data, views, arguments and/or comments on the proposed amendments.

Substantial questions have been raised regarding the adequacy of optical disk technology to preserve handwritten records or records that contain handwritten text. It has been suggested

[5] 17 CFR 240.17a–4(a) & (c).

[6] 17 CFR 240.17a–4(d).

[7] Securities Exchange Act Rel. No. 8875 (April 30, 1970), 35 FR 7643 (May 16, 1970).

[8] 17 CFR 240.17a–4(f).

[9] Letter to Mr. Robert F. Price, Alex. Brown & Sons, from Nelson S. Kibler, Assistant Director, Division of Market Regulation, Commission (November 2, 1979).

[10] The Securities Industry Association ("SIA") estimates that the cost savings that would result if a broker-dealer were to convert from a paper or microfilm record retention system to optical disk technology run from $250,000 a year for a medium-sized broker-dealer to more than $1.6 million a year for a large firm. Letter from Michael D. Udoff, Chairman, Ad Hoc Record Retention Committee, SIA, to Michael Macchiaroli, Assistant Director, Division of Market Regulation, Commission (May 19, 1992).

[11] In the alternative, broker-dealers who use outside service bureaus to preserve records may place in escrow and keep current a copy of the information necessary to access the format (*i.e.*, the logical layout) of the optical disks and to download records stored in optical disks.

[12] 17 CFR 240.17a–4(i).

that from the standpoint of examinations and discovery for judicial and quasi-judicial purposes, optical disk images (as well as microfilm or microfiche images) make very difficult the detection of alterations made to handwritten records and to records containing handwritten text. The Commission, therefore, is concerned about the use of microfilm, microfiche and optical disk technology to preserve these records, and requests comments on the advisability of preserving handwritten records and records containing handwritten text in hard copy.

IV. Summary of Initial Regulatory Flexibility Analysis

In accordance with 5 U.S.C. 630, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") concerning the proposed amendments. The analysis notes that the objective of the proposed rule amendments is to allow broker-dealers to employ optical disk technology for record retention purposes under 17 CFR 240.17a–4.

The proposed amendments do not alter the regulatory requirement for broker-dealers using currently accepted media for record retention purposes (i.e., microfilm, microfiche or paper). Instead, the proposal expands the record retention media by allowing broker-dealers to utilize optical disk technology to store records required under 17 CFR 240.17a–3 and 240.17a–4. Accordingly, the proposed amendments will not change the impact of current regulatory record preservation requirements on "small business[es]" or "small organization[s]," as those terms are defined in 17 CFR 240.0–10(c), subject to Rule 17a–5.

A copy of the IRFA may be obtained by contacting Julius R. Leiman-Carbia, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, tel: (202) 272–2824.

V. Statutory Analysis

The amendments are proposed pursuant to the authority conferred on the Commission by section 17(a)(1) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Brokers; Reporting and record-keeping requirements; Securities.

For the reasons set forth in the preamble, Title 17 Chapter II of the Code of Federal Regulation is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

2. § 240.17a–4 is amended by revising paragraph (f) to read as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

(a) * * *

(f) The records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 may be immediately produced or reproduced on microfilm, microfiche or, by means of optical storage technology, on an optical disk, and be maintained and preserved for the required time in that form.

(1) If such microfilm, microfiche or optical storage substitution for hard copy is made by a member, broker or dealer, it shall:

(i) At all times have available, for examination of its records by the staffs of the Commission and the self-regulatory organizations of which it is a member, facilities for immediate, easily readable projection of microfilm, microfiche or optical storage images and for producing easily readable facsimile enlargements of such images,

(ii) Arrange the records and indexes, and file the films and optical disks in such a manner as to permit the immediate location of any particular record,

(iii) Be ready at all times to provide, and immediately provide, any facsimile enlargement which the Commission by its examiners or other representatives may request, and

(iv) Store separately from the original, in an off-site location, a duplicate copy of the microfilm, microfiche or optical disk for the time required.

(2) If optical storage substitution for hard copy is made by a member, broker or dealer, it shall comply with the following requirements in addition to the requirements of paragraph (f)(1) of this section:

(i) The member, broker or dealer must notify its examining authority designated pursuant to section 17(d) of the Act prior to employing optical storage technology for record-retention purposes.

(ii) The member, broker or dealer must preserve the records employing optical storage technology that:

(A) Preserves the records exclusively in a non-rewriteable, non-erasable format;

(B) Verifies automatically the quality and accuracy of the optical storage recording process;

(C) Duplicates in a separate optical disk all information originally preserved and maintained by means of optical storage technology;

(D) Serializes original and duplicate optical disks, and time-dates permanently the information placed on such optical disks, and

(E) Has the capacity to download indexes and records preserved in optical disks into paper, microfilm, microfiche or other medium acceptable under § 240.17a–4(f).

(iii) The member, broker or dealer must organize and index accurately all information contained in every original and duplicate optical disk to ensure prompt access to the records.

(A) At all times, a member, broker or dealer must be able to have such indexes available for examination by the staffs of the Commission and the self-regulatory organizations of which the broker or dealer is a member.

(B) Each index must be duplicated and the duplicate copies must be stored in an off-site location, separately from the original copy of each index.

(C) Original and duplicate indexes must be preserved for the time required for the indexed records.

(iv) The member, broker or dealer must have in place an audit system providing for accountability regarding all access to records maintained and preserved using optical storage technology and any changes made to every original and duplicate optical disk.

(A) At all times, a member, broker or dealer must be able to have the results of such audit system available for examination by the staffs of the Commission and the self-regulatory organizations of which the broker or dealer is a member.

(B) The results of such audit system must be preserved for the time required for the audited records.

(v) The member, broker or dealer must maintain, keep current and surrender promptly upon request by the staffs of the Commission or the self-regulatory organizations of which the broker or dealer is a member all information necessary to download records and indexes stored in optical disks; or place in escrow and keep current a copy of the physical and logical file format of the optical disks, the field format of all different information types written on the optical disks and the source code, together with the appropriate

documentation and all information necessary to download records and indexes.

(vi) For every member, broker or dealer using optical storage technology for record preservation under this section, at least one third party ("the undersigned"), who has the ability to download information from the member's, broker's or dealer's optical disks to another acceptable medium, shall file with the Commission or its designee the following written undertakings:

The undersigned hereby undertakes to promptly furnish to the U.S. Securities and Exchange Commission ("Commission"), its designees or representatives, upon reasonable request, such information as is deemed necessary by the Commission's staff to download information kept on the broker's or dealer's optical storage system to another medium acceptable to the Commission's staff.

Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to information contained on the broker's or dealer's optical storage system, including, as appropriate, arrangements for the downloading of any record, required to be maintained and preserved by the broker or dealer pursuant to Rules 17a–3 and 17a–4 under the Securities Exchange Act of 1934 in a format acceptable to the Commission's staff. Such arrangements will provide specifically that in the event of a failure on the part of the broker or dealer to download the record into a readable format, upon being provided with the appropriate optical disks, the undersigned will undertake to do so, as the Commission's staff may request.

* * * * *

Date: July 9, 1993.

By the Commission.

Margaret H. MacFarland,

Deputy Secretary.

[FR Doc. 93–16810 Filed 7–14–93; 8:45 am]

BILLING CODE 8010–01–P

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17 CFR Part 270

[Release No. IC–19566, File No. S7–22–93]

RIN 3235–AF69

Certain Research and Development Companies

AGENCY: Securities and Exchange Commission.

ACTION: Rule proposal and request for comment.

SUMMARY: The Commission is proposing for public comment rule 3a–8 under the Investment Company Act of 1940. Rule 3a–8 is designed to address the special circumstances of research and development companies. Certain research and development companies maintain large amounts of liquid assets in the form of securities to fund their activities. Rule 3a–8 would provide a safe harbor from investment company status for a company engaged in research and development if it has held itself out and currently holds itself out as being primarily engaged in a noninvestment business, uses its capital to support its research and development activities, and makes investments that, taken as a whole, conserve capital and liquidity until it uses the funds in its primary business. Rule 3a–8 would be a nonexclusive safe harbor.

DATES: Comments must be received on or before October 13, 1993.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. All comment letters should refer to File No. S7–22–93. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: L. Bryce Stovell, Senior Special Counsel, at (202) 272–2048, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is seeking public comment on proposed rule 3a–8 [17 CFR 270.3a–8] under the Investment Company Act of 1940 [15 U.S.C. 80a]. Rule 3a–8 is intended to codify the terms of a Commission order under section 3(b)(2) for ICOS Corporation, a biotechnology company.[1]

Executive Summary

The Commission is proposing rule 3a–8 under the Investment Company Act [15 U.S.C. 80a] as a safe harbor exclusion from investment company status for certain *bona fide* research and development companies ("R&D companies").[2]

To fund their research and development activities during their lengthy product development phase,[3] R&D companies, particularly biotechnology companies,[4] raise large amounts of capital through offerings of their equity securities. They generally invest the proceeds in short-term, high quality debt instruments and use the return on these investments to fund their operations until they can begin product sales.[5]

Under section 3(b)(2), the Commission may declare that a company that invests in securities is, nonetheless, not an investment company if it determines that the company is not engaged primarily in the investment business. The Commission's traditional test for making this determination, however, was developed before the emergence of publicly held companies whose primary activity was research and development. It turns largely on the composition of the applicant's income and assets, *i.e.*, whether a large percentage of the income and assets is derived from investment securities. Thus, when it is applied to R&D companies the test understates their noninvestment business, which produces little or no income or assets during their product development phase. This has caused many of the companies to be concerned about their status under the Investment Company Act.

In the ICOS order, the Commission clarified the application of the primary business test to research and development activities. The

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[1] ICOS Corp., Investment Company Act Release Nos. 19274 [Feb. 18, 1993] (notice) and 19344 [Mar. 16, 1993] (order).

[2] Statement of Financial Accounting Standards No. 2 defines "research" as planned search or critical investigation aimed at discovery of new knowledge with hope that such knowledge will be useful in developing a new product or service or a new process or technique or in bringing about a significant improvement to an existing product or process. "Development" is the translation of research findings or other knowledge into a plan or design for a new product or process or for a significant improvement to an existing product or process whether intended for sale or use. *See* Accounting for Research and Development Costs, Statement of Financial Accounting Standards No. 2 (Fin. Accounting Standards Bd. 1974) at ¶ 8 ("SFAS No. 2"). Research and development expenses generally include costs incurred for materials, equipment, facilities, personnel, intangibles, and indirect costs that are clearly related to research and development activities. *Id.* ¶ 11.

[3] Many R&D companies have a distinct life cycle. During a "start-up" phase, they raise capital and acquire personnel and facilities. During the product development phase, which marks the commencement of operations, they raise additional capital and conduct research and development activities, but have not yet developed marketable products and have no revenues from product sales. During the mature product sales phase, an R&D company begins to realize significant revenues from the sale of products it has developed. *See, e.g.*, ICOS Corp., Inv. Co. Act Rel. 19274, *supra* note 1.

[4] Biotechnology is the application of engineering and technological principles to living organisms or their components to produce new inventions or processes. An important branch of biotechnology is genetic engineering, or recombinant DNA technology. On an industry-wide basis, research and development accounts for 38% of all expenses incurred by U.S. biotechnology companies. *See* Ernst & Young, Biotech 93: Accelerating Commercialization, Seventh Annual Report on the Biotech Industry 39 (1992).

[5] Several cycles of equity offerings and depletions of the resulting investment pools can occur before an R&D company achieves profitable operations, if ever.